Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

(2)

No. 96-289

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BENNIE FERGUSON, *et al.*,
Petitioners,

v.

F.R. WINKLER GMBH & CO. KG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT F.R. WINKLER GMBH & CO. KG TO PETITION FOR WRIT OF CERTIORARI

LEONARD L. LIPSHULTZ
Counsel of Record
RONALD G. DeWALD
VICTOR I. WEINER
LIPSHULTZ AND HONE, Chartered
8630 Fenton Street, Suite 108
Silver Spring, Maryland 20910
(301) 587-8500
Attorneys for Respondent
F.R. Winkler GMBH & Co. KG

18 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the issue of whether the Court of Appeals for the D.C. Circuit applied District of Columbia precedent regarding strict liability for a design defect an issue worthy of certiorari where it involves asserted errors of factual findings and misapplication of properly stated rules of the common law of the District of Columbia.

2. Is the issue of whether the Court of Appeals for the D.C. Circuit used the wrong standard of review in reversing the district court's denial of respondent's motion for judgment as a matter of law an issue worthy of certiorari where it involves assertions of erroneous factual findings and a misapplication of a properly stated rule of law.

PARTIES TO THE PROCEEDINGS

The original parties to the case, in addition to those identified by the petitioners, were Winkler International Corporation and Bakers Equipment Wholesalers, Inc. Both were dismissed by petitioners before trial by praecipe filed on November 4, 1993.

TABLE OF CONTENTS

Counterstatement of Questions Presented ..... *i*

Parties to the Proceedings ..... *ii*

Table of Contents ..... *iii*

Table of Cited Authorities ..... *iv*

Counterstatement of the Case 1

Reasons for Denying Writ 4

I. Whether the Court of Appeals for the D.C. Circuit applied District of Columbia precedent regarding strict liability for a design defect is not an issue worthy of certiorari because it involves asserted errors of factual findings and misapplication of properly stated rules of the common law of the District of Columbia. 4

II. Whether the Court of Appeals for the D.C. Circuit used the wrong standard of review in reversing the district court's denial of respondent's motion for judgment as a matter of law is not an issue worthy of certiorari because it involves assertions of erroneous factual findings and a misapplication of a properly stated rule of law. 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Cases Cited:

Del Vecchio v. Bowers, 296 U.S. 280 (1935) 4

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 5, 12

Leavitt v. Jane L., 116 S.Ct. 2068 (1996) 5, 6

McFarlane v. Caterpillar, Inc., 974 F.2d 176 (D.C. Cir. 1992) 11

Payne v. Soft Sheen Products, Inc., 486 A.2d 712 (D.C. 1985) 10

Pernell v. Southhall Realty, 416 U.S. 363 (1974) 4

Warner Fruehauf v. Boston, 654 A.2d 1272 (D.C. 1995) 5, 7, 8, 9, 10

Rules Cited:

Sup. Ct. R. 10. 11

Sup. Ct. R. 15.2. 1

Sup. Ct. R. 19(b) (1970). 5, 6, 7

No. 96-289

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BENNIE FERGUSON, *et al.*,

Petitioners,

v.

F.R. WINKLER GMBH & CO. KG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT F.R. WINKLER GMBH & CO. KG TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioners make several misstatements of fact in their petition that require correction. While these misstatements are not critical to the disposition of the petition, Sup. Ct. R.

15.2 requires that respondent address them in order to forestall the possibility of a waiver of objections.

Ottenberg did not purchase the Winkler String Line Proofer from Winkler U.S.A., LP. Petition at 2. That firm did not exist in 1975. It was distributed by a predecessor to one of the dismissed defendants.

Mr. Jehle, the respondent's employee on site at the installation, placed a warning sign on the infeed end of the proofer himself and provided additional warning signs for subsequent installation on the proofer.

Respondent originally designed the proofer with hooks as the means of attachment for the steel access panels. It changed the design to bolted on panels and subsequently changed back to the hook system. Respondent did not design the subject proofer's discharge end panel with hooks because "operators" of previous proofers equipped with bolted on panels removed the panels and left them off. *Id.* at 2-3. The hooked panels were used because in the intermediate design, maintenance workers routinely removed the bolted panels and left them off during cleaning of the proofer because of the relative lack of ease of bolting and unbolting these panels for routine maintenance.

Petitioners state that Bernard Jehle, Winkler's representative charged with overseeing the installation of the subject proofer in the Ottenberg bakery, testified that there was a persistent problem of hangers and doubles when he left Ottenberg. *Id.* at 3-4. He did not testify that such problems were common or persistent, only that an occasional dough

anomaly will occur with any proofer. This was corroborated by the testimony of a representative of another bakery. That bakery did not experience the dough problems present in the Ottenberg proofer. The evidence at trial showed that Ottenberg's problems were created by alterations that the bakery made to the proofer which affected the timing of the components of the line and which served, among other things, to increase the speed of the proofer beyond design parameters.

Petitioners refer to Ottenberg's replacement of the original solid metal panel at the discharge end of the proofer with a hinged plexiglass door. *Id.* at 4. However, petitioners omit that the hinged plexiglass door at that location was a unique innovation placed there by Ottenberg in an attempt to make it easier for the operators of the proofer to reach into the proofer to clear the inordinate amount of dough anomalies created by Ottenberg itself.

Petitioners state that Mr. Ferguson reached up and away from the shaft and sprockets and his arm was suddenly grabbed by an unguarded chain and dragged into an exposed socket. *Id.* This statement is without any support in the record. It was first made by petitioners in their brief. There simply is no evidence that Ferguson's arm was dragged by a chain into a sprocket. Ferguson testified that he did not know how his arm reached the shaft and sprocket.

REASONS FOR DENYING WRIT

I.

WHETHER THE COURT OF APPEALS FOR THE D.C. CIRCUIT APPLIED DISTRICT OF COLUMBIA PRECEDENT REGARDING STRICT LIABILITY FOR A DESIGN DEFECT IS NOT AN ISSUE WORTHY OF CERTIORARI BECAUSE IT INVOLVES ASSERTED ERRORS OF FACTUAL FINDINGS AND MISAPPLICATION OF PROPERLY STATED RULES OF THE COMMON LAW OF THE DISTRICT OF COLUMBIA.

This is a product liability case decided under state law.[1] The D.C. Circuit's opinion does not conflict with the decision of another circuit; it does not decide an important federal question that conflicts with a decision of a state court of last resort; the D.C. Circuit has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure of a lower court. However, the petition does, in effect, assert that the D.C. Circuit made erroneous factual findings and misapplied properly stated rules of law.[2]

---

[1] As petitioners correctly point out in their petition, decisions of the District of Columbia courts are treated as decisions of state courts for purposes of interpreting state law. *Pernell v. Southhall Realty*, 416 U.S. 363, 368 (1974).

[2] The Court has long held that it "will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited [to the District of Columbia] or declare the common law of the District." *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935) *Del Vecchio*, unlike the instant case, involved a law that was national in scope, the Longshoremen's

Respondent respectfully submits that these are not worthy bases for certiorari. Respondent further suggests that the D.C. Circuit, in any event, did not make erroneous factual findings and did not misapply the law.

Petitioners argue that the D.C. Circuit violated the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) by failing to follow pertinent D.C. precedent. They specifically argue that the court misapplied *Warner Fruehauf v. Boston*, 654 A.2d 1272 (D.C. 1995)[3], and its risk-utility test for evaluating strict liability design defect cases. The D.C. Circuit, they contend, set out on a course of its own by establishing a failure to warn as the sole consideration in determining whether the subject proofer was defectively designed. Even if petitioners were correct, this is not an issue worthy of a grant of certiorari.

The Court eliminated former Sup. Ct. R. 19(b) (1970) in 1980. That rule provided that a federal court of appeals' decision of an important state question was a basis for certiorari if it conflicted with applicable state law. Recently, the dissent in *Leavitt v. Jane L.*, 116 S.Ct. 2068 (1996) noted that this deletion "was intended to communicate our view that errors in the application of state law are not a sound reason for granting certiorari, except in the most extraordinary cases." *Id.* at 2073-2074. The per curiam opinion did grant certiorari on a question of state law, but in so doing acknowledged that the case was extraordinary and the substantive issue was

---

and Harbor Workers' Compensation Act. The instant case simply involves application of the District of Columbia common law to the specific facts of this case and has no national scope or implications.

[3] Also found in Petition Appendix at 4a-16a (hereafter "Pet. App. at __").

controversial, thereby limiting such grants, notwithstanding the deletion of former Rule 19(b), to rare cases:

> The fact observed by the dissent, that the "underlying substantive issue in this case" is a controversial one, generating "a kind of 'hydraulic pressure' that motivates ad hoc decision-making," post, at 2073, provides a greater, not a lesser, justification for reversing state-law determinations that seem plainly wrong. In our view, these considerations combine to make this an "extraordinary cas[e]" worth our effort of summary review, post, at 2073.

Id. at 2072.[4]

The substantive underlying issue in *Leavitt* involved state regulation of abortion. The substantive underlying issue in the instant product liability case involves no such controversial issue and is not, in any respect, an extraordinary case.

The dissent, in *Leavitt*, also pointed out that almost fifty years had passed since the last grant of certiorari in a case involving a federal appellate court's interpretation of state law. It also noted the Court had not granted certiorari in such a case

---

[4] The per curiam opinion also relied on its finding that the court of appeals was "plainly wrong" in interpreting the involved state law. *Id.* at 2073. The Court found that this amounted to "blatant federal-court nullification of state law." *Id.* at 2072. This is not true in the instant case, as will be discussed below. To the contrary, the D.C. Circuit was correct both in interpreting as well as applying the relevant D.C. law.

in the sixteen years since the elimination of former Rule 19(b)(1). *Id.* at 2074.

The per curiam and the dissent agreed that there has been a presumption that circuit courts correctly decide questions of state law. The per curiam opinion based this presumption on the questionable utility of the Supreme Court reviewing such decisions. The dissent attributed this deference, in part, to its conclusion that the courts of appeals had greater familiarity with the laws of states within their circuits and was better qualified to interpret them.

Whatever the basis, both views agreed that the review of questions of state law decided by lower federal courts should be rare and made only in extraordinary cases with national significance.

Respondent respectfully suggests that granting certiorari on this issue could have the deleterious effect of encouraging petitions for certiorari in federal diversity cases that do not involve issues of national significance. Save in the rare case, misapplication of state law has not been a sound basis for certiorari.

Even if the question of state law was for review, petitioners are incorrect in declaring that the D.C. Circuit failed to properly apply the relevant District of Columbia law. The D.C. Circuit, cited, quoted, and applied the District of Columbia Court of Appeals' latest expression of the law of strict liability for a design defect, *Warner Fruehauf*. Petitioners stated that the D.C. Circuit extracted one aspect of the risk-utility test, the adequacy of warnings, and raised it to

the level of sole consideration of the defendant's conduct in designing its product. However, the D.C. Circuit never did that. In its opinion, the court, after acknowledging that the D.C. Court of Appeals reviewed its first strict liability design defect case, said the following with respect to the D.C. court's holding:

> *Warner Fruehauf* further analyzed what constituted an unreasonably dangerous defect through a form of the commonly used "risk-utility balancing test," which looks to "'risks, costs and benefits of the product in question and alternative designs'" and compares "'the magnitude of the danger from the product [to] the costs of avoiding the danger.'" . . . . Implicit in this analysis is that a court should weigh only those risks of a product against which a manufacturer has some duty to guard a worker, including those risks that emerge from the normal use of the product or objectively foreseeable misuse of the product. . . .

Pet. App. at 9a-10a (citations omitted).

The D.C. Circuit determined that there was insufficient probative evidence presented by the petitioners to establish that the design was unreasonably dangerous during normal operations (Pet. App. at 11a), or during reasonably foreseeable misuse (Pet. App. at 12a). The court went so far as to assume that the design alternatives proffered by petitioners would have somewhat reduced the risk of injury. Pet. App. at 10a-11a. In the course of making these determinations, the court did review the adequacy of warnings placed on the proofer and in printed

materials. However, this was not the sole consideration. *See* Pet. App. at 11a-12a.

Nor did the D.C. Circuit predict that the D.C. Court of Appeals would make this the sole consideration. Instead, the court cited *Warner Fruehauf* for the proposition that a manufacturer may defend a strict liability design case by showing that there was a warning that reduced the product's dangers. A full quotation of the D.C. Court of Appeals' statement reveals the D.C. Circuit's intent:

> Under a risk-utility analysis, "[a] manufacturer [or distributor] is entitled to defend a strict liability claim based on defective design by showing that a warning accompanied the product that reduced its dangers." *Carter v. Johns-Manville*, *supra*, 557 F.Supp. at 1320. However, while the adequacy of a warning is relevant and may even tip the balance in the decision whether a product is or is not defectively designed, it is not the sole consideration: "A warning is only one of a product's many design attributes that weigh in the balance of dangers against utility ... but could be a pivotal design attribute in a particular case." *Id.* (emphasis added).

Warner Fruehauf, 654 A.2d at 1278.

The D.C. Circuit clearly held that the warnings that accompanied the subject proofer, while being only one of its many design attributes, would be pivotal in this particular case only after assuming that the design of the proofer did not deter dangerous conduct. Pet App. at 13a-15a. The federal appellate

court simply applied D.C. common law in the course of its appropriate *de novo* review of the evidence to determine whether the petitioners proffered sufficiently probative evidence to support the verdict. The D.C. Circuit's analysis of the warning issue was based on the hypothetical assumption that the proofer presented a reasonably foreseeable risk of harm, a risk that the court actually found did not exist. Pet. App. 11a-15a.

As for the question of the D.C. Circuit's review of the adequacy of the warnings, petitioners assail that court for determining that the warnings were adequate as a matter of law. Petitioners cite *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712 (D.C. 1985) for the proposition that the adequacy of a warning should not be decided as a matter of law. Petition at 14. Overlooked by petitioners is the fact that the court in *Warner Fruehauf* decided the question as a matter of law. Clearly, the D.C. Court of Appeals recognizes exceptions to its general rule. Thus, as a general proposition, the D.C. Circuit did not incorrectly interpret D.C. law on this point.

Petitioners' certiorari request is actually based on allegations of factual error. Petitioners would have this Court engage in a *de novo* review of facts to determine whether they, and any inference therefrom, support the notion that the warnings were inadequate. To aid this task, petitioners would have the Court compare the facts in the instant case with the facts in *Warner Fruehauf* to determine the adequacy of the warnings. That is precisely what petitioners did in their petition. They concluded that "[l]ike the defendant in *Warner Fruehauf*, Winkler's warnings were insufficient as a matter of law in the District of Columbia because they failed to warn the

user of the specific defect in the proofer." Petition at 16. Because the D.C. Circuit did not agree with their conclusion, petitioners argue, in essence, that the court made erroneous findings of fact and misapplied District of Columbia law. Thus, they petition the Court to redress those claimed errors. Such questions, while of great significance to the litigants here, have no significance beyond the confines of this case and should not support a grant of certiorari. *See* Sup. Ct. R. 10.

II.

WHETHER THE COURT OF APPEALS FOR THE D.C. CIRCUIT USED THE WRONG STANDARD OF REVIEW IN REVERSING THE DISTRICT COURT'S DENIAL OF RESPONDENT'S MOTION FOR JUDGMENT AS A MATTER OF LAW IS NOT AN ISSUE WORTHY OF CERTIORARI BECAUSE IT INVOLVES ASSERTIONS OF ERRONEOUS FACTUAL FINDINGS AND A MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

The D.C. Circuit looked, primarily, to *McFarlane v. Caterpillar, Inc.*, 974 F.2d 176, 178 (D.C. Cir. 1992) for the standard of review to be employed in reviewing the denial of respondent's motion for judgment as a matter of law:

> We review the denial of a motion for judgment as a matter of law *de novo*. . . . We will reverse the district court only if "reasonable men could not disagree" that the verdict was incorrect. . . . Even though we resolve evidentiary disputes in favor of Ferguson whenever reasonable, . . . the evidence on which the verdict relied must have been "more than merely colorable," but

> "significantly probative if the . . . verdict is to stand." . . . .

Pet. App. at 8a (citations omitted).

Petitioners do not criticize this statement of law. Instead, they conclude that the "D.C. Circuit merely paid lip service to the well established principles" found in prior D.C. Circuit decisions. Petition at 19. The essence of their argument is that "[t]he opinion of the D.C. Circuit is replete with errors of fact which there can be no doubt are the result of applying the wrong standard to its inquiry." Petition at 20. Petitioners make it clear that this "wrong standard" is the D.C. Circuit's failure "to view the evidence in a light most favorable to Mr. Ferguson, [failure] to draw reasonable inferences in his favor, and [failure] to resolve all factual disputes in his favor." *Id.* To reinforce their argument, petitioners cite examples of the court's "errant rendition of material facts". *Id.* Respondent disputes this contention, for it is petitioners who hold the erroneous view of the facts. Nevertheless, petitioners quarrel with the D.C. Circuit's *de novo* review of the evidence and the inferences that it made from the evidence, not the standard of review that it used in execution of that task. In so doing, they are asking this Court to make an independent *de novo* review of the record in the hope that a second appellate review will lead to a different outcome. As in part I. above, this is a question that lacks the earmarks of a certiorari worthy case. Again, petitioners allege errors of fact and misapplications of law, not compelling questions of national significance.

CONCLUSION

In an attempt to make this case into something that it is not, petitioners invoke *Erie v. Tompkins*, notions of federalism and the specter of federal common law. The instant case is not

one where the federal appellate court ignored District of Columbia common law or applied an erroneous standard for the review of denials of motions for judgment. This case has nothing to do with uniformity of decisions between state and federal courts on issues of state law, and will not influence forum shopping. This case is one where an appellate court made an appropriate *de novo* review of the evidence and disagreed with the district court's denial of a motion for judgment. The court of appeals applied District of Columbia law in this diversity case and came to a conclusion contrary to that of the district court and petitioners. Certiorari is not warranted.

Respectfully submitted,

LEONARD L. LIPSHULTZ
Counsel of Record
RONALD G. DeWALD
VICTOR I. WEINER
LIPSHULTZ AND HONE, Chartered
8630 Fenton Street, Suite 108
Silver Spring, Maryland 20910
(301) 587-8500
Attorneys for Respondent
F.R. Winkler GMBH & Co. KG